

HOUSE BILL REPORT

HB 3202

As Reported by House Committee On:
Local Government

Title: An act relating to Washington's vesting laws.

Brief Description: Changing Washington's vesting laws.

Sponsors: Representatives Simpson, Sells and Nelson.

Brief History:

Committee Activity:

Local Government: 1/29/08, 2/5/08 [DPS].

Brief Summary of Substitute Bill

- Revises vesting-related provisions with respect to various state laws pertaining to land use and property development.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Simpson, Chair; Takko, Vice Chair; Eddy and Nelson.

Minority Report: Do not pass. Signed by 3 members: Representatives Warnick, Ranking Minority Member; Schindler, Assistant Ranking Minority Member; Schmick.

Staff: Thamas Osborn (786-7129).

Background:

The "Vested Rights Doctrine" in the State of Washington

In the context of land use law, the concept of "vesting" is used to determine the point in time at which the laws and regulations controlling the division, use, or development of real property become fixed with respect to the development of a specific property, thus preventing such use or development from being subject to subsequent regulatory changes. Over the years, the determination of when a property owner's development rights become vested has been a key

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

issue for the Washington courts, resulting in the courts' development of what is known as the "vested rights doctrine."

In the case of *Noble Manor v. Pierce County*, 133 Wn.2d 269 (1997), the Washington Supreme Court (Court) summarized the "vested rights doctrine" as it had been developed by the courts under the common law:

"In Washington, 'vesting' refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.

At common law, this state's doctrine of vested rights entitled developers to have a land development proposal processed under the regulations in effect at the time that a complete building permit application was filed."

The Court went on to quote from a legislative report issued in 1987 in order to explain how the common law vesting doctrine operates in the context of a property owner's application for a building permit:

"The doctrine provides that a party filing a timely and sufficiently complete building permit application obtains a vested right to have that application processed according to zoning, land use and building ordinances in effect at the time of the application. The doctrine is applicable if the permit application is sufficiently complete, complies with existing zoning ordinances, and building codes, and filed during the period the zoning ordinances under which the developer seeks to develop are in effect. If a developer complies with these requirements, a project cannot be obstructed by enacting new zoning ordinances or building codes."

This common law vesting doctrine has been codified by the Legislature, in various forms, in several chapters of the Revised Code of Washington pertaining to land use, property development, and construction permitting.

Many other states have adopted vesting doctrines which are much more restrictive than those codified in Washington. Specifically, in many states vesting occurs only at such time as the local government authority gives *final approval* to an application for a land use, development project, or building permit.

Vesting of "Subdivisions" and "Short Subdivisions"

A property owner must have a proposed division of land reviewed and approved by the county, city, or town in which the land is located. Such divisions of land are generally categorized as either "subdivisions" or "short subdivisions." Subdivisions are defined as land divisions resulting in five or more lots, tracts, or parcels. Short subdivisions are defined as land divisions resulting in four or fewer lots, tracts, or parcels. However, a city, town, or Growth Management Act planning county may adopt a local ordinance increasing to a maximum of nine the number of lots, tracts, or parcels that may be contained within a short subdivision.

State law distinguishes between *subdivisions* and *short subdivisions* with respect to the vesting of development rights. For a period of five years following approval by the local planning authority of the final plat, the development of a *subdivision* is governed by the pertinent laws and regulations in effect at the time of such approval. In other words, subdivision development rights are vested for a period of five years following approval of the final plat. If the property is not developed within this five-year period, the property is *divested* and the subdivision may be subject to development regulations enacted subsequent to final plat approval. In addition, a local government may make changes to the applicable development regulations prior to the expiration of this five-year period in response to a change of conditions that creates a serious threat to public health or safety.

Short subdivisions, on the other hand, are not subject to the five-year vesting limitation applicable to subdivisions. Development rights with respect to short subdivisions become fully vested at the time that a complete application for short plat approval is submitted to the local planning authority and, therefore, are not subject to subsequent changes in land use or development regulations.

Local governments are required to adopt an ordinance defining when an application for subdivision approval shall be deemed complete.

Each preliminary plat submitted for final approval of the legislative body shall be accompanied by the following agencies' recommendations for approval or disapproval:

- local health department or other agency furnishing sewage disposal and supplying water as to the adequacy of the proposed means of sewage disposal and water supply;
- local planning agency or commission, charged with the responsibility of reviewing plats and subdivisions, as to compliance with all terms of the preliminary approval of the proposed plat subdivision or dedication; and
- city, town, or county engineer.

Vesting During the Pendency of a Petition for Review Before a Growth Management Hearings Board

The Growth Management Act (GMA) establishes three regional Growth Management Hearings Boards (Boards). Each Board consists of three members satisfying residency requirements and qualified by experience or training in matters pertaining to land use planning.

Boards have limited jurisdiction and may only hear and determine petitions alleging:

- that a state agency or planning jurisdiction is noncompliant with either the GMA, specific provisions of the Shoreline Management Act, or certain mandates of the State Environmental Policy Act relating to qualifying plans, regulations, or amendments; or
- that the 20-year planning population projections adopted by the Office of Financial Management should be adjusted.

A petition with a Board may be filed only by:

- the state or a planning jurisdiction;

- a person satisfying legal standing requirements of the GMA who has participated before the county or city regarding the matter on which a review is being requested;
- a person who is certified by the Governor within 60 days of filing the request with the Board; or
- a person that meets specific standing requirements of Washington's Administrative Procedure Act.

For the purposes of filing a petition with a Board, "person" is defined to any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

Final decisions of the Boards may be appealed to the superior court. Additionally, if all parties agree, the superior court may directly review a petition filed with a Board.

Periodic Local Government Review of Comprehensive Plan and Development Regulations

Under the GMA, comprehensive plans and development regulations are subject to continuing review and evaluation by the adopting county or city. Generally, a county or city is required to take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure that they comply with the requirements of the GMA. This review and evaluation process must include consideration of critical areas ordinances and, in some instances, an analysis of the population allocated to a city or county from the most recent 10-year population forecast by the Office of Financial Management.

Washington State Building Code: Building Permits and the Vesting Doctrine

The Washington State Building Code (Code) consists of a series of national model codes and standards that regulate the construction of residential, commercial, and industrial buildings and structures. The general purpose of the Code is to create minimum performance standards and requirements for construction and construction materials, consistent with accepted standards for engineering and safety. Counties and cities are authorized to create local amendments to the Code, provided such amendments are consistent with the Code's objectives and minimum performance standards.

The Code does not contain regulatory provisions pertaining to land use, property division, zoning, or site development. Rather, the Code explicitly states that such regulations are "reserved to local jurisdictions." However, the Code does contain vesting provisions pertaining to applications for building permits. Under these provisions, a land owner's development rights vest at the time a building permit application is submitted to the local building authority and, thereafter, the land owner is subject to only those permitting, zoning, or land use ordinances in effect at the time of the submission of the application.

Growth Management Act Planning for Projects Developed Outside of Urban Growth Areas

As part of its comprehensive land use plan, a county fully planning under the GMA must designate urban growth areas (UGAs) or areas within which urban growth must be encouraged and outside of which growth can occur only if it is not urban in nature. The GMA does,

however, permit the authorization of certain development activity outside of UGAs in fully planning counties. Some of these development application approvals are, however, considered an amendment to the jurisdiction's comprehensive plan.

Among the developments permitted outside of UGAs, but which have infrastructure/facilities needs and other characteristics which are urban in nature, are the following: (1) fully contained communities; (2) industrial land banks; and (3) master planned resorts. The GMA contains extensive planning requirements governing the creation of these categories of development so as to minimize their impact on the rural environment.

Summary of Substitute Bill:

Introduction

The act revises certain vesting-related provisions in state law by amending statutes in various chapters of the Revised Code of Washington, as well as adding a new statute to the GMA. The act has the general effect of revising the "vested rights doctrine" as it has been codified by the Legislature in the pertinent statutes.

Vesting under the GMA During the Pendency of a Petition for Review Before a Board

During the pendency of an appeal before a Board, or during the 60-day period following the publication of a comprehensive plan or development regulation adopted by a local government, whichever occurs later, the submission of an application for a development project will not result in the vesting of any development rights that may be subject to the plan or regulations in question. Under such circumstances, vesting may occur only after the Board's final decision or after the 60-day period, whichever occurs later, and such vesting will be in accordance with the pertinent laws and regulations in effect at that time.

Vesting in Relation to Local Government Review of the Comprehensive Plan and Development Regulations under the GMA

During the pendency of a local government's review and evaluation of its comprehensive plan and development regulations conducted pursuant to the requirements of the GMA, the submission of land use or development-related applications will not result in the vesting of any land use or development rights at the time of such submission. Rather, vesting will occur only at such time that the local government takes final action on the application, following the completion of the review and evaluation process. Vesting will then be in accordance with the pertinent zoning, permitting, and other land use control ordinances in effect at that time. However, the vesting moratorium that begins once a local government begins its GMA review and evaluation process is limited to the 18-month period following the filing of a complete land use or development application. Accordingly, a property owner's or developer's rights will vest 18 months after the filing of the application, even if the local government's review and evaluation process is continuing, and such vesting will be in accordance with the laws in effect at the time the application was completed.

Land use development applications filed after the submission or filing of a proposed amendment to a comprehensive plan or development regulation shall not vest until the time

the local government takes final action on the application and following the completion of all administrative appeals pertaining to the amendment. However, the vesting moratorium that begins at the inception of this amendment process is limited to the 18-month period following the filing of a complete land use or development application. Accordingly, a property owner's or developer's rights will vest 18 months after the filing of the application, even if the local government's amendment process is continuing, and such vesting will be in accordance with the laws in effect at the time the application was completed.

Vesting of Short Subdivisions

Beginning on July 1, 2008, any lots in a final plat filed for record are a valid land use for a period of five years from the date of filing, or once substantial construction has begun, whichever occurs earlier. Accordingly, such lots are not subject to changes in zoning laws during this period.

An application for preliminary plat approval is subject to GMA vesting provisions pertaining to how vesting occurs in relation to a Board's review process and the 60-day period following the publication of a comprehensive plan or development regulation by a local government. Specifically, an application for preliminary plat approval that is submitted during the pendency of an appeal before a Board, or during the 60-day period following the publication of a comprehensive plan or development regulation adopted by a local government, whichever occurs later, will not result in the vesting of any development rights that may be subject to the plan or regulations in question. Under such circumstances, vesting may occur only after the Board's final decision or after the 60-day period, whichever occurs later, and such vesting will be in accordance with the pertinent laws and regulations in effect at that time.

An application for preliminary plat approval is subject to additional GMA vesting provisions pertaining to how vesting occurs during the pendency of a local government's review and evaluation of its comprehensive plan and development regulations conducted pursuant to the requirements of the GMA. Specifically, the act of submitting an application for preliminary plat approval that is submitted during the pendency of this local government review and evaluation process will not result in the vesting of any development rights that may be subject to the plan or regulations in question. Rather, vesting will occur only at such time that the local government takes final action on the application, following the completion of the review and evaluation process. Vesting will then be in accordance with the pertinent zoning, permitting, and other land use control ordinances in effect at that time. However, the vesting moratorium that begins once a local government begins its GMA review and evaluation process is limited to the 18-month period following the filing of a complete land use or development application. Accordingly, a property owner's or developer's rights will vest 18 months after the filing of the application, even if the local governments review and evaluation process is continuing, and such vesting will be in accordance with the laws in effect at the time the application was completed.

Development rights for specified categories of large development projects vest at the time the permit application is approved or denied by the local government. Such projects include:

- fully contained communities as defined by the GMA;
- master planned resorts as defined by the GMA;

- specified large residential developments located outside of a UGA;
- retail developments exceeding 40,000 square feet of floor area; and
- specified developments on agricultural, mineral resource, or forest lands.

Washington State Building Code: Building Permits and the Vesting Doctrine

The permitting statutes of the Washington State Building Code are amended to create exceptions to the general rule that a land owner's development rights with respect to building permits vest at the time a permit application is submitted to the local building authority. The substance of these amendments is described in the sections below.

An application for a building permit is subject to GMA vesting provisions pertaining to how vesting occurs during a Board's review process and the 60-day period following the publication of a comprehensive plan or development regulation by a local government. Specifically, an application for a building permit that is submitted during the pendency of an appeal before a Board, or during the 60-day period following the publication of a comprehensive plan or development regulation adopted by a local government, whichever occurs later, will not result in the vesting of any permitting or development rights that may be subject to the plan or regulations in question. Under such circumstances, vesting may occur only after the Board's final decision or after the 60-day period, whichever occurs later, and such vesting will be in accordance with the pertinent laws and regulations in effect at that time.

An application for a building permit is subject to additional GMA vesting provisions pertaining to how vesting occurs during the pendency of a local government's review and evaluation of its comprehensive plan and development regulations conducted pursuant to the requirements of the GMA. Specifically, the act of submitting an application for a building permit that is submitted during the pendency of this local government review and evaluation process will not result in the vesting of any development rights that may be subject to the plan or regulations in question. Rather, vesting will occur only at such time that the local building authority takes final action on the application, following the completion of the review and evaluation process. The vesting of permitting rights will then be in accordance with the pertinent development-related regulations in effect at that time. However, the vesting moratorium that begins once a local government begins its GMA review and evaluation process is limited to the 18-month period following the filing of a complete land use or development application. Accordingly, a property owner's or developer's rights will vest 18 months after the filing of the application, even if the local government's review and evaluation process is continuing, and such vesting will be in accordance with the laws in effect at the time the application was completed.

Development rights for specified categories of large development projects vest at the time the building permit application is approved or denied by the local building authority. Such projects include:

- fully contained communities as defined by the GMA;
- master planned resorts as defined by the GMA;
- specified large residential developments located outside of a UGA;
- specified developments on designated agricultural, mineral resource, or forest lands; and

- retail developments exceeding 40,000 square feet of floor area.

Growth Management Act Vesting Rules Regarding Specified Categories of Development Projects

The act creates a new statutory section within the GMA that creates general rules pertaining to the vesting of specified categories of large development projects. Specifically, the vesting of any land use or development rights for specified categories of large development projects shall be in accordance with the pertinent ordinances that are in effect that on the date the permit application is approved or denied. Such projects include:

- fully contained communities as defined by the GMA;
- master planned resorts as defined by the GMA;
- specified large residential developments located outside of a UGA;
- specified developments on designated agricultural, mineral resource, or forest lands; and
- retail developments exceeding 40,000 square feet of floor area.

Exceptions for Specified Affordable Housing Developments

Subject to specified requirements, nonprofit affordable housing organizations or housing authorities involved in land use or development activities are exempted from otherwise applicable late vesting provisions. Under this exception, affordable housing-related development projects by such nonprofits or housing authorities would vest at the time of the application for the proposed land use or development project provided: (1) The nonprofit or housing authority produces evidence sufficient to support a finding that it would suffer an undue burden or cost impact that would jeopardize the affordable housing project if a later vesting date is imposed; and (2) the pertinent legislative review authority determines that it would be appropriate to apply the earlier vesting date. This decision by the legislative review authority is discretionary.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following revisions and additions to the original bill:

- The vesting "moratorium" that begins once a local government begins its GMA review and evaluation process is limited to the 18-month period following the filing of a complete land use/development application. Accordingly, a property owner's or developer's rights will vest 18 months after the filing of the application, even if the local governments review and evaluation process is continuing, and such vesting will be in accordance with the laws in effect at the time the application was completed.
- Subject to specified requirements, nonprofit affordable housing organizations or housing authorities involved in land use or development activities are exempted from otherwise applicable late vesting provisions. Under this exception, affordable housing-related development projects by such nonprofits or housing authorities would vest at the time of the application for the proposed land use or development project provided: (1) The nonprofit or housing authority produces evidence sufficient to support a finding that it would suffer an undue burden or cost impact that would jeopardize the affordable housing project if a later vesting date is imposed; and (2) the pertinent legislative review

authority determines that it would be appropriate to apply the earlier vesting date. This decision by the legislative review authority is discretionary.

- Special, more restrictive vesting provisions applicable to "commercial developments exceeding 40,000 square feet of floor area" are revised so as to apply to only "retail developments," and the references to "commercial developments" are deleted.
- The development of "mineral resource lands" is added to the list of large development projects that vest to the land use and development regulations in effect at the time the proposed development of such lands is approved or denied by the pertinent governmental authority.
- The more restrictive vesting provisions applicable to specified, large "retail developments" are included in the provisions of the bill relating to the vesting of short subdivisions. The original bill did not include explicit vesting provisions regarding retail developments among the amendments to the short subdivision statutes.
- Deletes amendatory provisions stating that if the definition of a local ordinance fails to include a definition of a "completed application," then vesting shall occur when the local government takes its final action on the application.
- Deletes inconsistent and confusing amendatory language regarding the five year vesting period applicable to short subdivisions. This deleted language was supplemental to the amendatory language creating the five-year short subdivision vesting limitation and its deletion has little or no substantive effect on the remaining language regarding short subdivision vesting.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Vesting laws should strike a careful balance between the interests of developers and the general public interest. Current vesting law is extremely out of balance because it tilts heavily in favor of developers and serves to defeat the public's interest in having development occur in accordance with current laws and regulations. This state has very early vesting (i.e., at time of application) which is the extreme minority rule in this country and is used by very few states. In fact, in the vast majority of states vesting occurs only after final approval of the project and the beginning of substantial construction. And, in most of the states not following the majority rule, vesting still does not occur until such time as the governing body gives final approval to the project. Accordingly, Washington's vesting laws represent an approach from a bygone era that has been abandoned by almost all other states. The negative scenarios stated

by the opponents of the bill are either wholly untrue or extremely exaggerated. The vast majority of states with the more modern late vesting statutes are not suffering any adverse economic impacts nor have they experienced resultant housing shortages. Also, the proponents claims that rolling vesting moratoriums will occur are contrary to recent experience, since there are very few instances where local governments initiate long-term reviews and evaluations of their development regulations.

The current, early vesting laws, on the other hand, are the source of very real problems for both local governments and the public. First, under current law, a development project can vest to development regulations that are later found to be illegal by either a growth management hearings board or the courts. Once such early vesting occurs, the development project can proceed under outmoded regulations that the local government has since amended or abandoned. This is clearly contrary to the public's interest in promoting development that is environmentally sound and consistent with public health and safety. Furthermore, the current early vesting rules encourage developers to "race to the permit counter" if they get wind of the fact that a local government may be considering the revision or amendment of local development regulations. The end result is that if a developer gets its application filed just prior to the adoption of amended regulations, it can avoid being subject to regulatory changes that may be necessary to protect the public interest with respect to the environment and/or generally promoting the public good. In short, early vesting has frequently resulted in development that has adverse impacts on the environment and the community as a whole. The bill would close these loopholes that are so often used by developers to their advantage and at the expense of the general public.

(Opposed) This is very bad legislation that should be defeated. The bill creates vesting rules that are unpredictable and lack clarity. Provisions that effectively create vesting moratoriums have no time constraints and therefore developers would face great uncertainty as to what development regulations will eventually apply. In fact, the bill could result in a "rolling moratorium" on development while local governments conduct open-ended reevaluations of their comprehensive plans and development regulations. The planning of a development can be very complex, time consuming, and expensive, thus developers need some certainty at the outset as to what development regulations will be applicable so as to enable them to plan accordingly. The late vesting rules in the proposed legislation would make initial planning very difficult and uncertain, and would impede new development. Also, the common law "vested rights doctrine" has been the cornerstone of Washington's property law since the 1950s. This doctrine was codified by the Legislature through consensus legislation that was carefully developed with input from many diverse interest groups. The result of this process is a body of law that successfully strikes a balance between the interests of property owners / developers and the public interest. The bill would upend this long-settled law and effectively eliminate the vested rights doctrine.

There are three basic reasons why this bill should not be passed: (1) it would discourage economic development and make Washington uncompetitive with other states; (2) it is unfair to large corporations who expend a great deal of time and money in planning developments with reference to those regulations in place at the time of the planning process; and (3) it is

very bad public policy, and perhaps unconstitutional, to suddenly change the legal basis for property ownership that has been in place for over 50 years. Furthermore, it is certain that, if passed, the bill will cause a huge amount of litigation. Finally, the bill would have negative impacts on the development of housing and defeat the goal of making housing more affordable. Other adverse economic impacts, both state and local, would occur as well.

Persons Testifying: (In support) Representative Simpson, prime sponsor; David Bricklin, Bricklin, Newman, & Dold; Keith Scully, Futurewise; Peggy Bruton, League of Women Voters of Washington; EL Johnson; and Tom Nevins.

(Opposed) Andrew Cook, Building Industry Association of Washington; Stuart Drebic, Olympia Master Builders; Chris McCabe, Association of Washington Businesses; Pat Schneider, Foster Pepper; Donald Marcy, Cairncross & Hempelmann; Brian Holtzclaw, The McNaughton Group; Larry Stout, Realtors; Bob Johnson, Lewis County; and Van Collins, Associated General Contractors of Washington.

Persons Signed In To Testify But Not Testifying: None.